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KOSBINA KONSULT (K) SDN BHD (IN LIQUIDATION) v. MADU JAYA DEVELOPMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
HASNAH MOHAMMED HASHIM JCA
B STEPHEN CHUNG JCA
[CIVIL APPEAL NO: W-02(C)(W)-1200-06-2017]
15 MARCH 2019

C ***CONTRACT:*** *Claims for work done – Claim by subcontractor – Award of project by Government to main contractor – Main contractor entered into subcontract at ratio of 92:8 – Project terminated and main contractor awarded for wrongful termination of project – Whether subcontractor entitled to claim compensation for works done in project on agreed ratio – Whether main contractor received benefits at expense of subcontractor – Whether main contractor unjustly enriched – Whether* D *claim time barred – Whether action res judicata as already ventilated in earlier action – Whether subcontractor proved value of works done – Claim under constructive trust by subcontractor – Whether to circumvent limitation period*

On 12 June 2003, the appellant was awarded a contract by the Government of Malaysia ('the Government') for a project ('main contract') and pursuant E to a subcontract dated 5 May 2004, the entire main contract was awarded to Danaukhas Holdings Sdn Bhd with the terms, *inter alia*, that the appellant was entitled to 10% commission of the subcontract sum. Due to the slow progress of the works, Danaukhas assigned the subcontract to Madu Jaya Enterprise Sdn Bhd ('MJE') where the same contract terms were adopted F except that, with regards to the commission, the ratio between MJE and the appellant was adjusted to 92:8. However, most of the correspondences and work flow during the project was between the appellant and the respondent, instead of MJE. The common factor between MJE and the respondent was one Angie who owned 99.99% shares of both MJE and the respondent. G Several problems arose in the course of the works resulting in four extensions being given by the Government to the appellant. As at 16 February 2007, 90% of the main contract works were completed. By a letter dated 21 February 2007, the Government terminated the main contract and consequently, the subcontract between the appellant and the respondent was also terminated. Initially, the respondent was supposed to cooperate with the H appellant to commence arbitration proceedings against the Government for the wrongful termination of the main contract. However, as the matter progressed, the appellant proceeded on its own without any contribution of finance or witnesses from the respondent. The appellant was finally awarded a total sum of RM21,873,376.73. In 2014, MJE commenced an action I against the appellant for compensation for works done in the project. MJE claimed, amongst others, a sum awarded against the Government in the arbitration based on the sharing formula of 92:8. However, the action was dismissed, principally on the ground that MJE was the wrong entity, out of

time in filing the action and that the various claims were not properly proven ('the first suit'). The decision was affirmed by the Court of Appeal ('CA'). Premised on the findings of the High Court Judge in the first suit that the subcontract between the appellant and MJE had effectively been replaced by a subcontract between the appellant and the respondent, the respondent commenced the present suit against the appellant, adding the claim for unjust enrichment and constructive trust. The respondent contended, *inter alia*, that the appellant had received benefits at the expense of the respondent from the value of works done and also costs incurred for the project which formed the basis of the interim award and the final award. The appellant had thus been unjustly enriched. Further and in the alternative, the appellant was holding the monies or was otherwise accountable to the respondent to the extent of RM11,420,791.73 as a constructive trustee. The appellant's defence was that the respondent's claim was time-barred and since the facts had been ventilated in the first suit, the doctrine of *res judicata* and estoppel applied against the respondent. The issue for the court's determination was whether the respondent could ignore or displace the subcontract and sue the appellant under unjust enrichment and constructive trust.

Held (allowing appeal with costs; setting aside order of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The basis of the proportionate share must certainly be based on the subcontract. The proportionate share came about only because of the agreement between the parties on the 92:8 formula. The respondent's position that there was no contract was not tenable based on the findings of the High Court in the first suit which was affirmed by the CA and considered by the trial judge in the judgment. There was thus a subcontract between the appellant and the respondent which replaced the subcontract between the appellant and MJE. (paras 31 & 32)

(2) The respondent could not subvert the subcontract and was not entitled to RM11.4 million of the arbitration award *simpliciter* without having to prove anything at all on the value of the works done. The evidence revealed that the draft final account between the appellant and the respondent had never been resolved during the last meeting between the parties. There was no evidence that the quantitative amount of the works done by the respondent pursuant to the subcontract had been agreed by both parties before or after the commencement of the arbitration. Equity cannot eclipse the subcontract and the respondent could not claim RM11.4 million as a matter of convenience in total disregard to the sanctity of the subcontract. (para 38)

(3) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the matter that had been adjudicated, as the judgment becomes the truth between such parties. MJE had commenced action against the appellant in the first suit, which was dismissed, *inter alia*, on

A the ground of limitation. The respondent, being privy to MJE, would be caught by *res judicata* and issue estoppel as far as limitation is concerned. Therefore, the claim for unjust enrichment ought to have been dismissed and the respondent could not use it as a tool to circumvent the law on limitation. (para 39)

B **(4)** The arbitration awards were the direct result of the legitimate arbitration process between the appellant and the Government pursuant to the main contract, which was a separate and distinct contract from the subcontract between the appellant and the respondent. The respondent's right of claim against the appellant remained intact for six years from the date C of the termination of the subcontract. The appellant did not concertedly prevent the respondent from filing any suit against the appellant due to the arbitration and neither did the appellant make any material representation to the respondent to wait for the outcome of the arbitration process between the appellant and the Government. Hence, D there was no forbearance to sue. (para 40)

(5) Constructive trust is imposed by equity in order to satisfy the demands of justice and good conscience. This was not a suitable case to adopt the equitable remedies and doctrine of equity. The respondent's argument that its claim for constructive trust was premised on the fact that there E was no contract was misconceived. Clearly, the subcontract existed. The claim under constructive trust was pleaded to circumvent the limitation period. The need to impose constructive trust on the appellant to justify the demands of justice and good conscience did not arise. Therefore, the decision of the trial judge on the respondent's claim under constructive F trust could not be sustained. (paras 41 & 42)

Bahasa Malaysia *Headnotes*

Pada 12 Jun 2003, perayu diawardkan kontrak oleh Kerajaan Malaysia ('Kerajaan') untuk satu projek ('kontrak utama') dan menurut satu subkontrak bertarikh 5 Mei 2004, keseluruhan kontrak utama diawardkan kepada G Danaukhas Holdings Sdn Bhd dengan terma-terma, antara lain, perayu berhak menerima 10% komisyen daripada jumlah subkontrak. Disebabkan kerja-kerja berjalan perlahan, Danaukhas memberi subkontrak kepada Madu Jaya Enterprise Sdn Bhd ('MJE') mengguna pakai terma-terma kontrak yang sama kecuali berkaitan dengan komisyen, dengan pembahagian antara MJE H dan perayu diselaraskan pada 92:8. Walau bagaimanapun, kebanyakan surat menyurat dan aliran kerja semasa projek adalah antara perayu dan responden, bukan MJE. Faktor bersama antara MJE dan responden ialah seorang bernama Angie yang memiliki 99.99% saham dalam kedua-dua MJE dan responden. Beberapa masalah timbul semasa perjalanan kerja-kerja I mengakibatkan empat lanjutan diberi oleh Kerajaan kepada perayu. Setakat 16 Februari 2007, 905 kerja kontrak utama telah diselesaikan. Melalui surat bertarikh 21 Februari 2007, Kerajaan membatalkan kontrak utama and dengan itu, subkontrak antara perayu dan responden juga dibatalkan. Pada

awalnya, responden sepatutnya bekerjasama dengan perayu untuk memulakan prosiding timbang tara terhadap Kerajaan untuk penamatan salah kontrak utama. Walau bagaimanapun, apabila perkara tersebut berjalan, perayu meneruskan dengan sendiri tanpa apa-apa sumbangan kewangan atau saksi-saksi daripada responden. Perayu akhirnya diawardkan jumlah keseluruhan RM21,873,376.73. Pada 2014, MJE memulakan tindakan terhadap perayu untuk pampasan terhadap kerja-kerja yang telah dilakukan dalam projek itu. MJE menuntut, antara lain, satu jumlah yang diawardkan terhadap Kerajaan dalam timbang tara berdasarkan formula perkongsian 92:8. Walau bagaimanapun, tindakan itu ditolak, terutamanya atas alasan MJE adalah entiti yang salah, terlebih masa untuk pemfailan tindakan dan tuntutan yang berbagai itu tidak dibuktikan sewajarnya ('guaman pertama'). Keputusan itu disahkan Mahkamah Rayuan ('MR'). Berdasarkan dapatan-dapatan Hakim Mahkamah Tinggi dalam guaman pertama bahawa subkontrak antara perayu dan MJE telah digantikan dengan efektif oleh subkontrak antara perayu dan responden, responden memulakan tindakan ini terhadap perayu, menambahkan tuntutan untuk pengkayaan tidak adil dan amanah konstruktif. Responden menghujahkan, antara lain, bahawa perayu telah menerima faedah-faedah daripada perbelanjaan responden untuk nilai kerja-kerja dan juga kos yang dibelanjakan untuk projek itu yang membentuk asas award interim dan award terakhir. Dengan itu, perayu dikayakan secara tidak adil. Selanjutnya dan secara alternatif, perayu memegang wang atau sebaliknya bertanggungan pada responden setakat jumlah RM11,420,791.70 sebagai pemegang amanah konstruktif. Pembelaan perayu adalah bahawa tuntutan responden terbatas oleh had masa dan oleh sebab fakta-fakta tersebut telah dikemukakan dalam guaman pertama, doktrin *res judicata* dan estopel terpakai terhadap responden. Isu untuk pertimbangan mahkamah adalah sama ada responden boleh bertindak tidak mengendahkan atau menggantikan subkontrak dan menyaman perayu bawah pengkayaan tidak adil dan amanah konstruktif.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah Mahkamah Tinggi)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Asas perkongsian ikut kadar semestinya berdasarkan subkontrak. Perkongsian ikut kadar timbul hanya kerana perjanjian antara pihak-pihak atas formula 92:8. Kedudukan responden bahawa tiada kontrak tidak boleh dipertahankan berdasarkan dapatan-dapatan Mahkamah Tinggi dalam guaman pertama yang disahkan oleh MR dan dipertimbangkan oleh hakim bicara dalam penghakiman. Oleh itu, wujud subkontrak antara perayu dan responden yang menggantikan subkontrak antara perayu dan MJE.

(2) Responden tidak boleh mensubversikan subkontrak dan tidak berhak mendapat RM11.4 juta daripada award timbang tara tanpa perlu membuktikan apa-apa langsung atas nilai kerja-kerja yang dilakukan. Keterangan mendedahkan deraf akaun terakhir antara perayu dan responden tidak pernah diselesaikan semasa mesyuarat terakhir antara pihak-pihak. Tiada keterangan bahawa jumlah kuantitatif kerja-kerja yang dilakukan oleh responden menurut subkontrak tersebut telah disetujui oleh kedua-dua pihak sebelum atau selepas permulaan timbang tara. Ekuiti tidak boleh melindungi subkontrak dan responden tidak boleh menuntut RM11.4 juta begitu sahaja dengan tidak mengendahkan langsung kekudusan subkontrak.

(3) Apabila perkara antara dua pihak dihakimi oleh mahkamah dengan bidang kuasa kompeten, mereka dan pihak-pihak yang berkait dengan mereka tidak dibenarkan melitigasi sekali lagi perkara yang telah dihakimi, kerana penghakiman itu menjadi kebenaran buat pihak-pihak. MJE telah memulakan tindakan terhadap perayu dalam guaman pertama, yang ditolak, antara lain, atas alasan had masa. Responden, dengan menjadi privi dengan MJE, terhalang oleh *res judicata* dan isu *estoppel* setakat yang berkaitan dengan had masa. Oleh itu, tuntutan untuk pengkayaan tidak adil wajar ditolak dan responden tidak boleh menggunakan alasan itu sebagai alat untuk memintasi undang-undang had masa.

(4) Award timbang tara adalah akibat langsung proses timbang tara sah antara perayu dan Kerajaan berdasarkan kontrak utama, yang adalah kontrak yang berasingan dan berbeza daripada subkontrak antara perayu dan responden. Hak tuntutan responden terhadap perayu kekal tidak diganggu untuk tempoh enam tahun dari tarikh penamatan subkontrak. Perayu tidak merancang untuk menghalang responden daripada memfailkan apa-apa guaman terhadap perayu disebabkan timbang tara dan perayu juga tidak membuat apa-apa representasi sebenar pada responden untuk menunggu keputusan proses timbang tara antara perayu dan Kerajaan. Oleh itu, tiada halangan untuk menyaman.

(5) Amanah konstruktif dikenakan ekuiti untuk memenuhi tuntutan keadilan dan dengan kemurnian. Ini bukan kes yang sesuai untuk menggunakan remedi-remedi ekuiti dan doktrin ekuiti. Hujahan responden bahawa tuntutannya untuk amanah konstruktif adalah berdasarkan fakta bahawa tiada kontrak, telah disalah tanggap. Jelas, wujud subkontrak. Tuntutan bawah amanah konstruktif diplidkan untuk memintasi tempoh had masa. Tidak timbul keperluan mengenakan amanah konstruktif atas perayu untuk menjustifikasi tuntutan keadilan dan kemurnian. Oleh itu, keputusan hakim bicara atas tuntutan responden bawah amanah konstruktif tidak boleh dikekalkan.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 FC ***(refd)***
Banner Homes Group Plc v. Luff Developments Ltd And Another [2000] 2 All ER 117 ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***
Lonrho Plc v. Fayed And Others (No. 2) [1991] 4 All ER 962 ***(refd)***
Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***
Woolwich Equitable Building Society and Inland Revenue Commission [1992] 3 All ER 737 ***(refd)***

For the appelant - SK Liow & MH Teo; M/s Liow & Co
For the respondent - Michael Chow Keat Thye & Foong Chee Keen; M/s Nik & Foong

[Editor's note: For the High Court judgment, please see Madu Jaya Development Sdn Bhd v. Kosbina Konsult (K) Sdn Bhd [2017] 1 LNS 1509 (overruled).]

Reported by S Barathi

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] This was an appeal by Kosbina Konsult (K) Sdn Bhd ("the appellant") against the decision of the High Court in allowing Madu Jaya Development Sdn Bhd's ("the respondent") claim for *inter alia* certain monies that the appellant obtained from the Government of Malaysia ("the Government").

[2] We had unanimously allowed the appeal. These are our full reasons.

The Background Facts

[3] On 12 June 2003, the appellant was awarded a contract by the Government for a project known as 'Naik Taraf Laluan Persekutuan 136 Dari Persimpangan Jalan Masuk ke Lebuhraya Utara/Selatan Hingga Bandar Baru (KM 42-KM 50)' ("the main contract").

[4] By way of a subcontract dated 5 May 2004 entered into between the appellant and Danaukhas Holdings Sdn Bhd ("Danaukhas") (now in liquidation), the entire works of the main contract was awarded to Danaukhas. The terms of the subcontract between the appellant and Danuakhas, *inter alia* was that the appellant was entitled to 10% commission of the subcontract sum. The value of the main contract and the subcontract was RM48,325,771.65.

[5] Due to the slow progress of the works by Danaukhas, by a letter dated 13 January 2005, Danaukhas assigned the subcontract to Madu Jaya Enterprise Sdn Bhd ("MJE"). On 20 January 2005, a subcontract agreement

was entered into between the appellant and MJE where MJE was awarded the subcontract works. The same contract terms between the appellant and Danaukhas were adopted except that with regards the commission, the ratio between MJE and the appellant was adjusted to 92:8.

[6] As it turned out, most of the correspondences and work flow during the project was not between the appellant and MJE but between the appellant and the respondent. The common factor between MJE and the respondent was Angie Ng Suat Leh, PW2 ("Angie") who owns 99.99% shares of both MJE and the respondent.

[7] Several problems arose in the course of the works resulting in four extensions being given by the Government to the appellant. As at 16 February 2007, 90% of the main contract works were completed.

[8] By a letter dated 21 February 2007, the Government terminated the main contract. Consequently, the subcontract between the appellant and the respondent was also terminated.

[9] Initially, the respondent was supposed to cooperate with the appellant to commence arbitration proceedings against the Government for the purported wrongful termination of the main contract. However, as the matter progressed, the appellant proceeded on its own against the Government without any contribution of finance or witnesses from the respondent.

[10] In the arbitration against the Government, the appellant claimed for various heads of damages while the Government had also counterclaimed against the appellant.

[11] On 6 July 2011, an interim award of RM7,781,369.05 was made in favour of the appellant. By a final award dated 10 October 2012, the appellant was awarded the sum of RM14,092,007.68 and the Government's counterclaim was allowed for the sum of RM295,000. After making adjustments for the counterclaim, the appellant was awarded a total sum of RM21,873,376.73.

Proceedings In The High Court

[12] In 2014, MJE commenced an action against the appellant in the High Court Kuala Lumpur claiming for compensation for works done in the project. Amongst others, MJE claimed against the appellant a sum awarded against the Government in the arbitration based on the sharing formula of 92:8 in the subcontract dated 20 January 2005.

[13] The action was dismissed by the High Court on 26 June 2015 principally on the ground that MJE was the wrong entity; that MJE was out of time in filing the action and that the various claims were not properly proven ("the first suit"). The decision of the High Court was affirmed by this court on 12 January 2016.

[14] Premised on the findings of the High Court in the first suit that the subcontract between the appellant and MJE had effectively been replaced by a subcontract between the appellant and the respondent, in February 2016, the respondent commenced the instant suit against the appellant. In the instant suit, the respondent added the claim for unjust enrichment and constructive trust.

[15] It was the pleaded case of the respondent that Angie had not caused any proceedings to be commenced against the appellant for the value of work done given the cooperation and the understanding that the parties would have worked together to seek recovery against the Government.

[16] It was further pleaded by the respondent that pursuant to the interim award and the final award, the total value of works done and also the costs incurred by and attributable to the respondent in respect of the project was RM11,420,791.93. The respondent contended that the appellant had received benefits at the expense of the respondent from the value of works done and also costs incurred for the project which formed the basis of the interim award and the final award. The appellant thus had been unjustly enriched at the expense of the respondent, and that further or in the alternative, the appellant was holding the monies or was otherwise accountable to the respondent to the extent of RM11,420,791.73 as a constructive trustee.

[17] In its statement of defence, the appellant pleaded *inter alia* that the respondent's claim is time barred, the cause of action having accrued on 21 February 2007 when the main contract/subcontract was terminated. It was further pleaded that this fact had been ventilated in the first suit albeit against MJE and/or that the doctrine of *res judicata* and estoppel applies against the respondent.

[18] The appellant further pleaded that the respondent failed to particularise the calculation of RM11,420,791.73 which is under the head of special damages; that there is no proper nexus pleaded between the amount claimed and the arbitration awards and that the respondent was *mala fide* and selfish to 'piggyback' on the arbitration awards without making any contribution at all in terms of finance or witnesses.

Findings Of The High Court

[19] The learned judge allowed the respondent's claim on both unjust enrichment and constructive trust. Judgment was entered for the respondent for the reduced and apportioned sum of RM8,360,173.40 based on the ratio of 50:50 formula. His Lordship concluded that the respondent had proved that they had executed all the works required of them in the main contract between the appellant and the Government.

[20] The learned judge recognised that limitation had set in where the respondent's rights are concerned. However, His Lordship ruled that it would be totally unconscionable and grossly unfair and most unreasonable for the appellant to keep the whole of the award sums to themselves, in complete disregard to the expressed intention of 92:8 sharing formula.

[21] The learned judge took into account the fact that the appellant had proceeded with the arbitration with the risks in that, should the award be against the appellant and the appellant is held liable to pay the Government, then the appellant will have to pay first before looking to the respondent for recovery of the sums paid. The learned judge therefore made an order that the appellant retained 50% of the arbitral award and that the balance 50% be released to the respondent. His Lordship then made adjustments by deducting the respondent's portion for the amounts that the respondent conceded in evidence that they are not entitled to, before arriving at the sum of RM8,360,173,40.

[22] His Lordship alluded to the principle that a constructive trust would be imposed by the courts to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties. In support of his finding on constructive trust, the learned judge relied on *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169; *Lonrho Plc v. Fayed And Others (No. 2)* [1991] 4 All ER 962; *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679; [2005] 2 MLJ 42 and *Banner Homes Group Plc v. Luff Developments Ltd And Another* [2000] 2 All ER 117.

[23] Dissatisfied with the decision of the High Court, the appellant appealed to this court.

The Appeal

[24] The argument for the appellant may be summarised as follows:

(i) that the respondent's relationship with the plaintiff was no more than a contractual relationship for the project works and that the respondent's right to sue for works done if any, against the appellant was founded squarely and entirely on the subcontract;

(ii) that the learned judge failed to address the two distinct and separate contracts between the appellant and the Government and between the appellant and the respondent;

(iii) that the learned judge erred in ignoring the sanctity of contract between the appellant and the respondent;

(iv) that there was no evidence to suggest that the parties had 'common intention' or that parties had manifested any conduct to show that there was cooperation and understanding that the parties would work together to seek recovery against the Government to create a trust;

(v) that the respondent was not entitled simpliciter to RM11.4 million pursuant to the arbitral award; and

(vi) that the learned judge was in serious judicial error in entering judgment for the respondent on the 50:50 formula when it was never pleaded nor argued.

[25] The respondent on the other hand submitted that its claim against the appellant was not founded on contract as there was no contract between the appellant and the respondent; that the respondent was not privy to the contract between MJE and the appellant and that the contract between MJE and the appellant had been abandoned.

[26] On unjust enrichment, learned counsel for the respondent submitted that the appellant had been enriched by reason of the arbitration award as it was the respondent who did the works under a total subcontract.

[27] It was further submitted for the respondent that the respondent was not claiming for works done but that they were claiming for the proportionate share of the arbitration award and that the respondent's claim for unjust enrichment was based on common law.

[28] On constructive trust, learned counsel submitted that the learned judge had correctly referred to the relevant principles pertaining to the circumstances and that any payments received by the appellant from the Government would have been affixed with a trust to the extent of the respondent's entitlement.

[29] In respect of the issue of limitation, it was submitted for the respondent that a cause of action in unjust enrichment would arise from the date the appellant was enriched and given that the appellant obtained the interim award and the final award on 6 July 2011 and 10 October 2012 respectively, the filing of the instant suit by the respondent in February 2016 was well within the six years limitation period.

Our Decision

[30] Having perused the appeal records and having considered the submissions of the parties, we found that the real issue that requires our determination was whether the respondent could ignore or displace the subcontract and sue the appellant under unjust enrichment and constructive trust.

[31] We wish to state at the outset that it seemed to us that the respondent had taken a contradictory stand. The respondent on the one hand contended that the claim for unjust enrichment was made under common law and that there was no contract between the appellant and the respondent, but had on the other hand claimed for the proportionate share of the arbitration award

under unjust enrichment. This begs the question: what is the basis of the proportionate share? It must certainly be based on the subcontract. The proportionate share came about only because of the agreement between the parties on the 92:8 formula.

[32] The respondent's position that there was no contract was not tenable given the finding of the High Court in the first suit which was affirmed by this court and which had not escaped the learned judge's mind when he said: "As stated though the letter of agreement was with MJE, for all practical purposes it is now read as referring to the plaintiff as the plaintiff was in effect the party carrying out the works …". There was thus a subcontract between the appellant and the respondent which replaced the subcontract between the appellant and MJE.

[33] It was further submitted by the respondent that it was entitled under the law to claim for unjust enrichment independent of the subcontract. In this regard the learned judge had relied on *Goff & Jones, The Law of Unjust Enrichment* Eight Edition, Sweet & Maxwell and the English case of *Woolwich Equitable Building Society and Inland Revenue Commission* [1992] 3 All ER 737 to state *inter alia*:

> … By same token, even if a cause of action in contract has expired because of limitation having set in, it does not prevent a claimant from pursuing this claim in unjust enrichment if that cause of action is still subsisting.

[34] With respect, we disagreed with the learned judge. Low Weng Tchung in his book '*The Law of Restitution and Unjust Enrichment in Malaysia*' states the following with which we respectfully endorsed:

> [2.26] Contractual agreement to prevail. While it is now beyond question that the law of restitution and unjust enrichment is separate and distinct category of the law of obligations, it must always be borne in mind that the law of restitution and unjust enrichment cannot be utilized so as to override, subvert or defeat the terms of any contract between the parties, especially where such contract has made express provision as to the allocation of risk between the parties.
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> [2.27] No redistribution of risk allocation by contract. Generally speaking, in the absence of any vitiating factors such as fraud, duress or misrepresentation resulting in any agreement being avoided *ab initio*, and where the agreement has not been frustrated due to impossibility of performance, the agreement between the parties should not be disturbed, and the courts should not invoke the law or restitution and unjust enrichment to redistribute risks which have been allocated by the mutual agreement of the parties.

[35] As propounded by the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, the law of unjust enrichment is recognised by which justice is done in a range of factual circumstances and the restitutionary remedy is applied to attain justice. Nonetheless we observed that in dream property, the law of unjust enrichment was articulated under the context of '*The Relief Questions*'. This is what the Federal Court said:

> [93] So far we have dealt with the issue pertaining to the liability questions. We conclude that the defendant only paid 10% deposit of the purchase price and failed to pay the balance of the purchase price even though obliged to do so under the SPA. As correctly decided by the High Court and the majority of the Court of Appeal, the plaintiff had, in our judgment, validly terminated the SPA.
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> [94] This brings us to the relief questions.
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> The Relief Questions
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> Unjust Enrichment and Restitution
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> [95] To a large extent, this issue deals with the restitution that the defendant claims it is entitled to, over and above the costs of construction of the mall, under the law of unjust enrichment.

[36] The decision of the Federal Court in *Dream Property* in our view is of no assistance to the respondent. In *Dream Property*, the Federal Court did not move away or disregard the sanctity of contract between the parties as can be seen below:

> [107] … The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor.

[37] We therefore agreed with the appellant that the learned judge erred in law in that His Lordship's decision is akin to allow the law of unjust enrichment to displace, defeat, override and/or undermine the clear terms of the subcontract between the appellant and the respondent.

[38] We therefore resolved the issue in favour of the appellant. The respondent cannot subvert the subcontract and in this regard, we agreed with the appellant that the respondent was not entitled to RM11.4 million of the arbitration award *simpliciter* without having to prove anything at all on the value of the works done. The evidence revealed that the draft final account between the appellant and the respondent had never been resolved during the last meeting between the parties. There was no evidence that the quantitative amount of the works done by the respondent pursuant to the subcontract had been agreed by both parties before or after the commencement of the

arbitration. Equity cannot eclipse the subcontract and the respondent cannot claim RM11.4 million as a matter of convenience, in total disregard to the sanctity of the subcontract.

[39] The respondent took the position that the appellant had been enriched because it was not the appellant that had completed the works. That may be so, and indeed MJE had commenced action against the appellant in the first suit. It must be highlighted that in the first suit, MJE's claim was also premised on the same arbitration awards. The first suit was dismissed on *inter alia*, the ground of limitation. The respondent, being privy to MJE would be caught by *res judicata* and issue estoppel as far as limitation is concerned. It was held by the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 that when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the matter that had been adjudicated, as the judgment becomes the truth between such parties. (see also the cases of *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788 and *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 which set out the principle that the doctrine of *res judicata* also applies to a non-party). On this ground, the claim for unjust enrichment ought to have been dismissed by the learned judge. The respondent could not use its claim for unjust enrichment as a tool to circumvent the law on limitation.

[40] Further, we agreed with the appellant that the arbitration awards were the direct result of the legitimate arbitration process between the appellant and the Government pursuant to the main contract, which is a separate and distinct contract from the subcontract between the appellant and the respondent. The respondent's right of claim against the appellant remained intact for six years from the date of the termination of the subcontract ie, 21 February 2007. The appellant did not concertedly prevent the respondent from filing any suit against the appellant due to the arbitration and neither did the appellant make any material representation to the respondent to wait for the outcome of the arbitration process between the appellant and Government. There was no forbearance to sue.

[41] As for constructive trust, which is a trust imposed by equity in order to satisfy the demands of justice and good conscience, the court in *Sinar Wang Sdn Bhd (supra)*, held *inter alia* that equitable remedies and doctrines are flexible and adaptable to particular circumstances and that the court of equity may mould the relief to be granted on particular facts.

[42] We were of the view that this was not a suitable case to adopt the equitable remedies and doctrine of equity. The respondent, through its privy, had claimed for the sum under the same arbitration awards and had not succeeded. The respondent's argument that its claim for constructive trust

was premised on the fact that there was no contract was misconceived. Clearly, the subcontract existed. On the facts of this case, we were of the view that in effect, the claim under constructive trust was pleaded to circumvent the limitation period. The need to impose constructive trust on the appellant to justify the demands of justice and good conscience did not arise. We therefore could not sustain the decision of the learned judge on the respondent's claim under constructive trust.

[43] In the circumstances, we allowed the appeal with costs. The order of the High Court was set aside.